IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 404

WARNER D. ORVIS, HOMER W. ORVIS, FLOYD Y. KEELER, F. HOWARD SMITH, HAROLD A. ROUSSELOT, HENRY A. BALFOUR, J. ANTONIO ZALDUONDO, WILLIAM G. WIGTON, CLIFFORD J. DOERLE, and HERBERT R. JOHNSON, Doing Business Under the Firm Name and Style of ORVIS BROTHERS & Co., and JOHN J. MCCLOSKEY, JR., as City Sheriff of the City of New York,

Petitioners,

v.

JAMES P. MCGRANERY, Attorney General of the United States, as Successor to the Alien Property Custodian.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR LEO ZITTMAN, AMICUS CURIAE

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Pursuant to the filed consent of the parties, Leo Zittman files this brief as *amicus curiae* in support of a reversal. Zittman was petitioner in the two cases of *Zittman* v. *McGrath*, 341 U. S. 446 and 471, which, for convenience, are hereafter called *Zittman No. 1* and *Zittman No. 2*.

The Issue Here

Petitioners, Orvis Bros. & Co. (hereafter "Orvis") are commodity brokers. In June, 1943, a Japanese national, Sanko Kabusiki Kaisya (hereafter "Sanko") owed $19,796.85 to Orvis. Orvis sought to recover the debt. Since war precluded personal service of process on Sanko, on June 28, 1943 Orvis sued by attaching a frozen credit existing in Sanko's favor with Anderson, Clayton & Co. (hereafter "Acco"). Under New York and federal law, the attachment impressed a "fixed and present" [1] lien on the Acco debt to secure the Orvis claim. *Zittman No. 1*, 341 U. S. 446.

Orvis took judgment against Sanko and sought a license under the freezing controls to execute on its judgment against the attached Acco debt. Twice such a license was refused.

In June and November of 1947, the Alien Property Custodian [2] *res* vested the entire attached Acco debt. Orvis brought this suit against the Custodian under Sec. 9(a) of the Trading with the Enemy Act [3] to enforce its attachment lien against the Acco debt.

The District Court, on motion, gave judgment for Orvis. The Court of Appeal reversed.

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[1] Cardozo, J. in *Sanders* v. *Armour Fertilizer Works*, 292 U. S. 190, 208. Under New York Law, the levy of the attachment warrant impresses a lien upon the attached property as "security for the judgment the plaintiff may recover." *Fielmann* v. *Brunner*, 2 Hun 354, 356; *Lynch* v. *Crary*, 52 N. Y. 181, 184; *Embree* v. *Hanna*, 5 Johns. 101, 103.

[2] The term "Custodian" as used herein refers to either the Alien Property Custodian or the Attorney General who succeeded to his powers and duties. Exec. Order No. 9788, 11 F. R. 11981.

[3] All references herein to the "Act" are to the Trading With the Enemy Act. All references to "Sections" are to sections of that act.

The issue here is this: **Can the Custodian hold and appropriate—as well as vest—the Orvis lien interest or must he return it to Orvis in this Sec. 9(a) suit?**

The Interest of This Amicus

The attachment liens which were the subject of litigation in the *Zittman* cases are still unsatisfied. Zittman is vitally interested in any holding or opinion here which may bear on his rights as they were decreed by this Court in the *Zittman* cases.

The instant case turned upon the fact that Orvis attached after General Ruling No. 12, 7 F. R. 2991, had issued on April 21, 1942. Zittman attached months before that ruling had issued. This factual distinction would preclude the holding below from serving as a precedent for further proceedings in the *Zittman* cases and many others like it. Nonetheless, we believe that this distinction should not preclude a recovery by Orvis. If Orvis recovers, Zittman's right to recover is *a fortiori*.

ARGUMENT

I

Since, under the Zittman cases, Orvis' attachment lien is good against Sanko, it is also good against the Custodian who may hold only Sanko's interest.

Orvis' rights, pressed in this Section 9(a) suit, must be measured by the law as it was on June 25, 1943 when Orvis perfected its attachment lien. *Holt* v. *Henley*, 232 U. S. 637, 640. At that time, only two remedies were open to the American creditor as against his enemy debtor. He could sue the enemy, if the latter's property had not been vested. He could sue the Custodian under Section 9(a), if it had been vested.

Though the Sec. 9(a) remedy was available in 1943 (*Markham* v. *Cabell*, 326 U. S. 404), the Custodian had not yet vested the Acco debt. Since vesting is discretionary (*Clark* v. *Allen*, 331 U. S. 503, 511), it could not then be known whether he would ever vest. Actually, he did not vest the Acco debt until four years later, on June 27, 1947. Until such vesting, Orvis could not have sued under Sec. 9(a). And, of course, Orvis could not have filed a claim under Sec. 34 of the Trading With the Enemy Act. Section 34 did not exist until August 8, 1946.

Orvis chose the only remedy open to it—a suit against its debtor. Circumstances limited even this remedy. Sanko could not be sued *in personam*. War precluded personal service. Orvis attached; it had no other choice. In so doing, it pursued a remedy traditionally accorded to the American citizen against his enemy debtor. It is settled—both at common law and under the Trading With the Enemy Act—that, despite the existence of war, the citizen may sue the enemy and attach his property. *Watts, Watts & Co.* v. *Unione Austriaca Navigazione, etc.*, 248 U. S. 9; *Trading With the Enemy Act*, § 7(b); 137 A. L. R. 1369, note. This right to sue and attach has been reaffirmed by the Treasury in its administration of the freezing controls [4] and by this Court in the *Zittman* cases.

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[4] In the *Zittman* cases the Custodian stipulated as facts the following (341 U. S. 446, 458, n. 28):

"5. From the inception of 'freezing' controls, all litigants who, prior to commencing attachment actions against funds belonging to blocked nationals, had requested the Secretary of the Treasury to license an attachment, or levy, received from the Treasury Department a response of the following nature:

"Under Executive Order No. 8389, as amended, and the Regulations issued thereunder, no attempt is made to limit the bringing of suits in the courts of the United States or of any of the States. However, should you secure a judgment against one of the parties referred to in your letter which is a country covered by the Order, or a national thereof, a license would have to be secured before payment could be made from ac-

The priority effected by the Orvis attachment lien was fully in harmony with existing state and federal law and policy. The state law accorded priority to attaching creditors in the order in which they attached. *N. Y. Civil Practice Act*, §§ 960, 680. Similarly, where the debtor's property had been seized by vesting, federal law accorded priority to the claims of citizens in the order in which they sued the Custodian under Sec. 9(a). *U. S.* v. *Securities Corp. General*, 4 F. 2d 619, 622, aff'd. 269 U. S. 283; 32 *Op. Atty. Gen.* 57.

Whatever may be the policy established by Sec. 34 in 1946, it is clear that, in June, 1943, both state and federal law measured the rights of the citizen creditor by his diligence alone.

Now, more than nine years later, the Custodian demands that, as against him, Orvis be stripped of rights legitimately garnered in 1943 under then existing state and federal law. He insists that this is required by the policy underlying the vesting power and the freezing controls. The law and settled administrative practice are to the contrary.

A

While Congress permitted the Custodian to seize the Orvis lien interest by vesting, it forbade him to appropriate it.

The Custodian seized the Orvis lien interest in the Acco debt by an unopposed *res* vesting of the Acco debt. This

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counts in banking institutions within the United States in the name of such country or national.

"6. From the inception of 'freezing' controls, the Secretary of the Treasury in administering the 'freezing' control program adopted the position, in response to numerous requests made of him, that the bringing of an action, the issuance of a warrant of attachment therein, and the levy thereunder upon blocked property found within the jurisdiction of the court which issued the warrant were not forbidden but that a license was required to be secured before payment could be made from the blocked account to satisfy any judgment recovered in such action.

"7. * * * **A license to institute the action and levy the attachment was in fact not required by the Treasury Department.**"

was his right. It is clear that he may *res* vest the property of friendly aliens and even of citizens. *Becker Steel Co.* v. *Cummings*, 296 U. S. 74, 79.

The taking decides nothing; the Custodian gains no substantive rights in the vested property. The *res* order "gives nothing but preliminary custody. It attaches the property to make sure that it is forthcoming if finally condemned, and does no more." *Central Union Trust Co.* v. *Garvan*, 254 U. S. 554, 569.

In this case, the *res* order merely substituted the Custodian "as possessor of the credits and funds leaving unadjudicated the effect of substitution of custody upon the attaching creditors' rights." *Zittman No. 2*, 341 U. S. 471, 473.

By *res* vesting the Custodian may take property interests which he is forbidden to appropriate. *Gussefeldt* v. *McGrath*, 342 U. S. 308, 313. The citizen may recover his interest so taken in a Sec. 9(a) suit "unembarrassed by the precedent vesting." *Stoehr* v. *Wallace*, 255 U. S. 239, 246. This is such a suit.

The issue here is **whether the Custodian could appropriate the Orvis lien interest after he had taken it.** The answer to this question must be found in the Trading With the Enemy Act—not in administrative practice. *White* v. *Mechanics' Securities Co.*, 269 U. S. 283, 301.

The Act is clear. By Sec. 5(b), Congress authorized the Custodian to vest "any property or interest of any foreign country or national thereof." But, by Sec. 34(d), it allowed him to appropriate and distribute only the "interest owned by the [alien] debtor *immediately prior* to its vesting." Sec. 34(b) enjoins him from distributing any interest which is the subject of a proceeding for return under Sec. 9(a) or Sec. 32. Sec. 9(a) compels him to disgorge any interest not enemy owned.

Secs. 34(b) and (d) and Sec. 9 state the Congressional policy with respect to vested assets. They specify that it is the alien interest at the time of vesting—not freezing—which determines what the Custodian may ultimately hold and appropriate.

The Acco debt was vested on June 27, 1947, four years after Orvis had attached. On the day of vesting, Sanko's interest in the attached debt was limited by the Orvis attachment lien. *Zittman* so holds. 341 U. S. 446, 464-5. The Custodian—like Sanko—was confined by the plain language of Secs. 9(a) and 34(d) and (i) to Sanko's limited interest. The District Court rightly held that the Custodian was required to return to Orvis its interest—an interest which, by Secs. 34(b), (d) and (i), he was forbidden to appropriate and administer and by Sec. 9(a) he was commanded to return.

The Custodian argued—and the Court of Appeals held—that though, under *Zittman No. 1*, the Orvis lien would have withstood a right, title and interest vesting, here it was destroyed because the Custodian had *res* vested. This is a misconception. Procedure—not substance—is determined by the type of vesting order issued. If the Custodian prefers to take first and to impose upon the citizen the burden of testing the Custodian's right to appropriate what he has taken, he issues a *res* order. If he prefers to test his right to appropriate before he takes, he issues a right, title and interest order. The choice is the Custodian's. But nothing implicit in the right to choose who shall initiate the test suggests that the choice shall, of itself, decide the outcome of the test.

Where the interest proposed to be taken is that of a citizen, as it is here, the Custodian must forego the taking if he has issued a right, title and interest order (*Zittman No. 1*); he must disgorge what he has taken, if he has issued a *res* order. Sec. 9(a); *Kahn* v. *Garvan*, 263 F. 909; *Central Union Trust Co.* v. *Garvan*, 254 U. S. 554, 569. This he must do in obedience to the Congressional dictate in Secs. 9(a) and 34(b) and (d). This Congress must require of

him in obedience to the Constitution. *Garvan* v. *$20,000 Bonds*, 265 Fed. 477, 479; *Becker Steel Co.* v. *Cummings*, 296 U. S. 74, 79; *Russian Volunteer Fleet* v. *U. S.*, 282 U. S. 481.

The *Zittman* cases applied these principles to lien interests acquired by attaching American creditors. *Zittman No. 2*—a *res* vesting case—reaffirmed the Custodian's right to take the attached funds. The taking decided nothing. It merely substituted the Custodian "as possessor of the credits and funds, leaving unadjudicated the effect of such substitution of custody upon the attaching creditors' rights." 341 U. S. 473. Since the taking raised no issue as to the Custodian's right to appropriate what he took, this Court necessarily reserved decision on his right to appropriate until this issue was later raised. There is no jurisdiction to adjudicate the right to appropriate in a suit to enforce a taking by *res* vesting. *Miller* v. *Kaliwerke, etc.*, 283 Fed. 746, 752.

What *Zittman No. 2* thus left open, *Zittman No. 1* concluded. *Zittman No. 1*—a right, title and interest case—tested the extent of the alien interest in the attached property. It held that the alien was entitled only to the unattached residue. This—the unattached residue—thereby became the measure of the Custodian's interest since he succeeds only to the interest of the alien.

Under *Zittman No. 1* the Orvis lien bound the alien, Sanko. Of necessity, it bound the Custodian in this Sec. 9(a) suit. Here, as in *Zittman No. 1*, the Custodian is limited to the alien interest. Sec. 34(d); *J. Kahn & Co.* v. *Clark*, 178 F. 2d 111, 113; *Commercial Trust Co.* v. *Miller*, 262 U. S. 51, 56.

The Custodian, having admitted,[5] as he must under *Zittman*, that the Orvis attachment lien is good as against

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[5] See Custodian's brief in the Court of Appeals, p. 8. In his brief in this Court in the *Zittman* cases, at p. 49, the Custodian said:

"Respondent does not contend that the attachments were absolutely void or that they were illegal. He agrees that freezing

Sanko, conceded the case. He cannot undo the force of that concession by arguing here for a license requirement which §§ 9 and 34 do not impose and which, in *Zittman*, this Court has already held to be unnecessary.

* * * * * *

Since Secs. 9(a) and 34(b) and (d) forbade the Custodian to appropriate the Orvis lien, the holding below is plainly error unless that holding is compelled by the freezing controls. We turn now to the freezing controls as they bear on the issues in this suit.

B

Congress did not intend to achieve by freezing a purpose which it disclaimed in Secs. 9(a) and 34.

Twice now—in *Lyon* v. *Singer*, 339 U. S. 841, and in the *Zittman* cases—this Court has held that the freezing controls permitted the citizen to sue the alien debtor, though frozen funds were involved. The suit—and the attachment of frozen funds in aid of it—need not be licensed. Such attachments without license were "permissible and valid at the time they were levied." *Zittman No. 1*, 341 U. S. 446, 458; supra, footnote 4.

The Custodian would have this Court undo here what it did in *Zittman*. He asks this on the strength of policy arguments which he pressed unsuccessfully in the *Zittman* and *Singer* cases. Again he says, by the freezing controls "the United States, acting in time of emergency leading to war, sought to maintain assets subject to them [i.e. to the freezing regulations] in *status quo* until the national policy with respect thereto should ultimately be determined by the

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did not purport to prohibit the resort to judicial process. He states simply that transfers in blocked property were proscribed and that the judicial hand was stayed to that extent. Not attachments, but transfers, were controlled."

Congress and the Executive".[6] Here, as in the *Zittman* cases, he contends that to permit the attachment of frozen funds is to impair this policy.

In every freezing controls case before this Court, the Custodian has offered this confiscatory aim as the policy underlying the controls. He offers, as authority, the views of administrative officers. Not a single apt Congressional authority is cited, though Congress is the authentic mouthpiece of its will.

Congress has left no doubt as to what it intended to appropriate and entrust to the Custodian for administration. By Sec. 34(d) of the Trading With the Enemy Act, it specified that the Custodian is to administer only the "interest owned by the [alien] debtor, *immediately prior* to its vesting"—not the alien interest as of the time of freezing. It forbade him to distribute any interest, such as that of Orvis, which was the subject of a suit for return under Sec. 9(a). With the impact of vesting so explicitly defined, it cannot be inferred that vesting was meant to be effective as of the time of freezing. No purpose could be served by permitting the Custodian to take as of the time of freezing when, under Sec. 34, he could deal only with the alien interest as of the time of vesting.

Sec. 32, enacted March 8, 1946—five months before Sec. 34—authorized the President to return to certain enemies and aliens who could not qualify under Sec. 9(a) their interests as they were immediately prior to vesting. *Gusseſeldt* v. *McGrath*, 342 U. S. 308, 315. It is unthinkable that

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[6] Respondent's brief in opposition to Orvis' petition for certiorari, p. 9.

Recently, this Court has said that returns under Secs. 9(a) and 32 are not limited by Sec. 39 which declares that returns are not to be made to nationals of Germany and Japan. Sec. 39 deals only with the residue remaining after returns under Secs. 9(a) and 32. *Gusseſeldt* v. *McGrath*, 342 U. S. 308, 315. Since, in purpose, Sec. 39 is subordinated to Secs. 9(a) and 32, there is no merit in respondent's argument that Sec. 39 should be read so as to deny the Sec. 9(a) remedy to the Orvis lien.

Congress would refuse to Orvis, a citizen, what it authorized the President to do for certain enemies whose assets had been frozen and vested.

The Government's actions—as distinguished from its arguments—belie the Custodian's notion that freezing was intended to dam up a reservoir of alien funds to be vested later for ratable distribution among American creditors and other post-war ends.[6a]

Almost one hundred general—and countless specific—licenses[7] have issued authorizing frozen funds to be applied to private ends. Licenses have issued authorizing payment of attachment liens impressed upon frozen enemy and other foreign funds at the suit of American creditors.[8] We believe that this Court will take judicial notice of the fact that, while *Lyon* v. *Singer* was pending before this Court, frozen Japanese funds there involved were licensed

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[6a] Since freezing applied to the property of alien friends as well as enemies, it is unthinkable that Congress would freeze, for future confiscation, the property of Frenchmen, Norwegians, Danes and others of our alien friends. Construed as a confiscatory measure, the controls would be a complete reversal of our traditional policy toward the property of alien friends; it would, indeed, be patently unconstitutional under the Fifth Amendment. *Becker Steel Co.* v. *Cummings*, 296 U. S. 74, 79, 81; *Russian Volunteer Fleet* v. *U. S.*, 282 U. S. 481, 489, 491.

[7] The general licenses up to September 15, 1946 are compiled in the Treasury Department's publication entitled *Documents Pertaining to Foreign Funds Control*, dated Sept. 15, 1946.

[8] In the *Zittman* cases, the Custodian stipulated as facts the following (*Zittman* record in this Court, p. 66):

> "7. The Treasury Department has at various times issued licenses authorizing payment out of a blocked account of a blocked national for the purpose of making payment on a judgment recovered in an action where a prior warrant of attachment was issued and levied upon the blocked account of a blocked national therein notwithstanding that a particular license to institute the action and levy the attachment was not procured by the plaintiff and judgment-creditor. A license to institute the action and levy the attachment was in fact not required by the Treasury Department."

for payment to an Iranian creditor while, almost simultaneously, the same relief was denied to an American citizen. By these Executive acts the Government sanctioned the distribution of frozen funds among American and foreign creditors of blocked nationals and others long before it could be known who all of the creditors were, what their claims totalled, or what assets would be available to pay those claims and before the time for filing claims expired [9] —and, indeed, without requiring the claims to be processed under Sec. 34. These Executive acts were a wanton breach of federal law and policy if, as the Custodian says, the purpose of freezing "was to hold the funds 'as is' for subsequent disposition" [10] ratably among American creditors and for post-war purposes.

In truth, Congress initiated the controls to keep the Axis from seizing at gun point assets here belonging to the invaded countries and their nationals.[11] To this end, it empowered the President to screen transactions in frozen property and to withhold sanction from those resting on Axis conquest. Legitimate transactions were to be unaf-

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[9] Sec. 34(b), enacted August 8, 1946, authorizes the Custodian to fix a bar date for claims which shall not extend beyond two years from the date of the last vesting in the case of the particular debtor or from the date of the Act, whichever is later.

[10] Quoted from Respondent's brief in opposition to Orvis' petition for certiorari, p. 11.

[11] The freezing controls were enacted on May 7, 1940 (54 Stat. 179) by a Joint Resolution of Congress amending Sec. 5(b) of the Trading With the Enemy Act. Sen. Wagner, chairman of the committee which had reported out the Resolution, stated its purpose as follows:

> "* * * The purpose of the joint resolution, of course, is very clear. We want to protect property within the jurisdiction of the United States which is owned by these governments [Norway and Denmark] or their nationals" (86 Cong. Rec., 5006).

See also: Sen. Glass in 86 Cong. Rec. 5175-5176, and Sen. Connally in 86 Cong. Rec. 5007.

fected.[12] The frozen property was to continue subject to the claims of Americans.[13] As established by Congress, the controls were a weapon to be used solely against Axis aggression. They were a check on the use of frozen property by the Axis—not a device to immunize frozen funds from the legitimate claims of American citizens. Congress has not deviated from its purpose.

The Court of Appeals thought that, because Orvis attached after General Ruling 12, a different result is required here than would be justified in the *Zittman* cases in which the attachment preceded General Ruling 12. While conceding that General Ruling 12 validated the attachment as against the blocked national, the Court of Appeals concluded that the Ruling operated to void the attachment in the event of a *res* vesting.

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[12] "Mr. Wagner: * * * I wish to emphasize the point that *this does not absolutely prohibit the transfers, it merely provides that the Government may investigate* to determine whether the transfer was made voluntarily or under duress, to be perfectly candid. *If the transfer is voluntarily made, our Government, of course, will in no way interfere.* But where the transfer is induced, as can be easily established, by duress, we have a right to protect the national of any country against that sort of an imposition, using a very mild term, with respect to securities and other evidences of ownership subject to our laws" (86 Cong. Rec. 5007). (Italics supplied.)

"Mr. Wagner: *The joint resolution does not absolutely prohibit any transaction. It simply contemplates, if an Executive order is issued, that each transaction be scrutinized to determine whether it was bona fide or accomplished through duress.*

"Mr. Barkley: That is right" (86 Cong. Rec., 5175-5176).

In the debate on the amendment of Sec. 5(b) by the First War Powers Act, Congressman Williams summarized the purpose of freezing as follows:

> "It [the 'freezing control'] following immediately the invasion of Norway, Belgium, and Holland by Germany, and it was enacted for the very *purpose of protecting their nationals* and their property in this country from transactions and transfers *forced upon them by the Germans at that time.* That was the purpose of it. There was no intention and there is no intention at all now that it should be applied to any transactions or any property in which an American citizen has an interest." 87 Cong. Rec. 9865 (1941).

[13] Senators Barkley and Wagner in 86 Cong. Rec. 5006.

It is true, of course, that, since Orvis attached after Gen. Ruling 12 in contrast to Zittman who attached months before the Ruling, General Ruling 12 does not apply to *Zittman* and this case does not parallel the *Zittman* cases on the facts. What was overlooked below is the fact that, since the Custodian, however he vests, acquires only the alien interest, Gen. Ruling 12 in reaffirming the validity of the attachment against the alien requires the same result as against its successor, the Custodian.

This Court made it clear that the attachments in *Zittman* were good as against General Ruling 12 not only because that Ruling did not operate retrospectively but also because the Ruling was not intended to nullify attachments. To ascribe to the Ruling a contrary purpose would be "inconsistent and irreconcilable with the contentions made two days after its issuance by both the Treasury and the Department of Justice." 341 U. S. 446, 452-3. To permit the Ruling to be interposed as a bar to the satisfaction of American creditors' claims out of frozen funds "would be complete frustration of a large part of the freezing program." 341 U. S. 446, 457.

As an attempt to deal with the problem of attachment of frozen funds, General Ruling 12 leaves much to be desired in the way of clarity and appreciation of the requisites of a valid attachment. Piercing the Rulings contradictions and ineptnesses,[14] this Court in *Zittman* construed the

[14] In *Zittman* this Court said of General Ruling No. 12 (341 U. S. 446, 452):

> "* * * Whether an administrative agency could thus lump all attachments as prohibited 'transfers' without reference to the nature of the rights acquired or steps taken under the various state laws providing for attachments, presents a question which we need not decide here. * * *"

Since attachment without license was authorized by the Treasury (supra, footnote 4), the Orvis attachment would be enforceable under General Ruling 12, subd. 3, "to the same extent as it would be valid or enforceable but for * * * section 5(b) of the Trading With the Enemy Act" and Exec. Order 8389. Contrast this statement with the

General Ruling so as not to destroy the traditional right of the citizen to satisfy his claim out of enemy property. It was error for the Court below to hold otherwise.

* * * * * *

The Orvis lien was a vested property right in 1943. Congress did nothing before and has done nothing since which authorizes the Custodian to destroy it. Nor could it, constitutionally, have given such authority. *Security-First National Bank* v. *Ridge Land & Nav. Co.*, 85 F. 2d 557, 561. Indeed, there is strong reason to believe that the Custodian, contrary to constitutional dictates, has abused the authority which he actually did get by denying licenses to some American creditors, such as Orvis, when, in similar circumstances, the Government has unhesitatingly granted licenses to other citizens and even to aliens.[15] *Yick Wo* v. *Hopkins*, 118 U. S. 356.

The holding below is an unwarranted departure from the rationale of the *Zittman* cases.

II

Sec. 34 of the Trading With the Enemy Act does not annul attachment liens.

Contrary to the view of the Court of Appeals—Sec. 34 is not analogous to the Bankruptcy Act. The purpose of the Bankruptcy Act is to discharge the honest bankrupt from the burden of his debts. *Local Loan Co.* v. *Hunt*, 292 U. S. 234, 244. Sec. 34 expressly disclaims such a purpose. Sec. 34, as it plainly says, applies only to that creditor who seeks "satisfaction of a **debt** claim" out of vested property. It does not apply to the creditor who chooses to by-pass the Custodian and to proceed directly against the alien

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proviso of General Ruling 12, subd. 4. Also contrast subd. 4 with the requisites of a valid attachment as laid down in *Pennoyer* v. *Neff*, 95 U. S. 714.

[15] See footnote 8, supra p. 11. See record in *Zittman* cases, pp. 66-69.

debtor. Under Sec. 34(i), such a creditor may bring "any suit at law or in equity"—presumably including attachment actions—against his alien debtor, regardless of whether he could have claimed under Sec. 34. If the creditor chooses to claim under Sec. 34, any distribution received by him is *pro tanto* satisfaction only. He may pursue the alien for the balance. Sec. 34(i).

Bankruptcy affords the creditor his sole remedy. Sec. 34 affords him a remedy in addition to suit. The purposes of the two are contrasting. The former is for the benefit of the debtor and cuts off the creditor's usual remedies against him. The latter is for the benefit of the creditor and preserves to him every remedy which he may have against his debtor "at law or in equity." The bankruptcy trustee succeeds to all of the bankrupt's assets by operation of law. *Bankruptcy Act*, § 70. The Custodian takes only those assets of the alien debtor which he chooses to vest. Sec. 5(b); *Clark* v. *Allen*, 331 U. S. 503, 511.

The Court of Appeals failed to grasp the divergent purposes of the two enactments. Analogizing Sec. 34 to a bankruptcy enactment, it strained to find, in Sec. 34, a purpose to annul attachment liens. It so found because allegedly,

> A. "Sec. 34(g) establishes an order of priority of claims but accords no priority to attachment liens over ordinary claims."
>
> B. The direction in Sec. 34(d) to apply vested property "equitably" to the payment of the alien's debts is inconsistent with the recognition of attachment liens.
>
> C. Since some state laws do not accord a lien to the attaching creditor, the laws of those which do must be stricken down to achieve uniformity.

Not one of these reasons withstands analysis.

A

Sec. 34(g) merely ranks unsecured claims. It does not purport to deal in any way with attachment or other liens.

The Court of Appeals would destroy the Orvis lien because Sec. 34(g) gives no priority to attachment liens. It is true that this section accords no priority to attachment liens. This is not—as thought below—because such liens are to be disregarded. It is because—as Mr. Justice Douglas noted in *Zittman No. 1*—Sec. 34(g) "does not purport to deal with" liens "lawfully acquired in judicial proceedings." 341 U. S. 446, 465n. In fact, it does not deal with any lien interests. Sec. 34(g), as it plainly says, sets up a schedule of priorities for "Debt claims" only.

Lien claims are dealt with by Sec. 34(i). This section gives the lien claimant a choice. He may press his lien under Sec. 9(a) or under Sec. 34 or under both. Whichever course he chooses, Sec. 34(i) makes it clear that his security interest remains inviolate. Having painstakingly protected "security interests" in Secs. 9(a) and 34(i), Congress cannot be said to have intended, by inference, to accomplish precisely the contrary in Sec. 34(g) addressed to "debt claims" only.

The Congressional materials make this clear. The Senate Report on the law which enacted Sec. 34 (Senate Rep. No. 1839, 79th Cong., 2d Sess.) says at page 9:

> "Protection of a secured creditor or a creditor claiming a lien is afforded by the proviso in sub-sec. [34] (i). Such a claimant may proceed as a general creditor, without thereby waiving his security. In addition, or alternatively, he may file a claim or suit as a title claimant for return of his security interest in the property or for just compensation in respect of that interest, in which event his recovery would be reduced as in the case of any other such plaintiff, to the extent of any debt-claim payment made to him (or to any other claimant, if his claim as a title claimant was not filed in time to hold up debt-claim payments). It is believed that this arrangement is preferable to provision of a separate special procedure for secured creditors."

The House Report is identical. H. Rep. No. 2398, 79th Cong. 2d Sess., p. 15.

The rights of lien claimants are to be found in Secs. 9(a) and 34(i). The Court below erred in seeking them in Sec. 34(g).

B

The direction to the Custodian to make distribution equitably requires him to recognize—not nullify—attachment liens.

Sec. 34(a) provides that the property of an alien debtor, when vested, "shall be *equitably* applied by the Custodian * * * to the payment" of the alien's debts. The Court of Appeals held that equity would not be served by enforcing attachment liens. To hold otherwise, it said, would be to put diligence above equity.

The Orvis attachment lien was acquired in 1943. As we have already shown (supra, pp. 3-5) at that time equity rewarded the diligent. That creditor came first who sued first. To destroy rights validly fixed under the laws of 1943 because of a change made in 1946 is itself abhorrent to equity. This Court will not impute to Sec. 34 "an intent to take away rights lawfully retained, and unimpeachable at the moment when they took their start." *Holt* v. *Henley*, 232 U. S. 637, 640 (in which the Court upheld a creditor's lien against a later amendment of the Bankruptcy Act which would have destroyed it).

If, as is claimed, Sec. 34 is grounded on the precepts of equity, that section compels recognition of the Orvis lien. In equity, the Custodian would be bound to yield to an attachment precedent to his vesting. *In re People of the State of N. Y. by Beha*, 253 N. Y. 365; *West Virginia P. & P. Co.* v. *Peoples Home Journal, Inc.*, 233 App. Div. 376; *Ward* v. *Conn. Pipe Mfg. Co.*, 71 Conn. 345; *Buswell* v. *Order of the Iron Hall*, 161 Mass. 224; *Kittredge* v. *Asgood*, 161 Mass. 384.

This is also the sense of Sec. 34(d). Under this subsection, debt claims may be paid only out of "any property or interest owned by the debtor immediately prior to its vesting." This excludes from the fund available to the Custodian for unsecured claims the amount of any precedent attachment lien interest which, as here, is good as against the alien. Under Sec. 34(b), the Custodian must keep intact the funds or property so claimed, pending adjudication of the lien interest under Sec. 9(a). Under Secs. 34(b) and (d), the Custodian—like the alien from whom he takes—is bound by the attachment lien. Sec. 34 merely enacts the rule long followed in equity.

Under Sec. 34, as in proceedings under Sec. 9(a), the interest of the lien claimant is inviolate. Nothing in the purpose of Congress to achieve equality among unsecured *debt* claimants "warrants leveling the good faith *lien* claimant to the unsecured status of the others." (Douglas, J., concurring in *Zittman* v. *McGrath*, 341 U. S. 446, 465.)

C

Uniformity will be served—not offended—by recognizing the Orvis lien.

The Court of Appeals felt that recognition should be denied to the Orvis lien because in some states "attachment does not create a lien" and to recognize such a lien in the others "will result in a lack of uniformity." This misconceives existing federal policy.

The difference in treatment accorded to creditors by the various states is inevitable and logical under our federal system. Uniformity is not properly served by adopting one state rule and rejecting all others. This Court has so held in another area which is also "peculiarly of national concern." Thus, although the Constitution expressly requires (Art. 1, Sec. 8) "uniform laws" on the subject of bankruptcy, the dictate of uniformity is met by the Bankruptcy Act which recognizes and enforces the laws of the

states in respect to priorities, liens etc., "although in these particulars the operation of the act is not alike in all States." *Stellwagon* v. *Clum*, 245 U. S. 605, 613.

The bankruptcy definition of "uniformity" is even more apt here because Sec. 34(i) reserves to the creditor, if he so chooses, the right to resort to the varying state remedies.

* * * * * *

With the whole range of ordinary legal remedies carefully preserved by Sec. 34(i) to the American creditor against his alien debtor, there is no warrant for reading into Sec. 34 a purpose to destroy those remedies.

III

This suit was properly brought under Sec. 9(a).

The Custodian contended below that, because he did not license the Orvis attachment, the Sec. 9(a) remedy is not available to Orvis; Orvis, he says, must proceed only under Sec. 34.[16] Though the Court of Appeals rejected this view, the Custodian reasserts it here. It is without substance.

A

The lien creditor may, at his election, enforce his lien by proceeding under either Sec. 9(a) or Sec. 34 or both.

Sec. 34(i) says:

> "(i) The sole relief and remedy available to any person seeking satisfaction of a debt claim out of any property or interest which shall have been vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the proceeds thereof, shall be the relief and remedy provided in this section, and suits for the satisfaction of debt

[16] Respondent's brief in the Court of Appeals, pp. 8, 14.

claims shall not be instituted, prosecuted, or further maintained except in conformity with this section: Provided, That *no person asserting any interest, right or title in any property or interest or proceeds acquired by the Alien Property Custodian, shall be barred from proceeding pursuant to this Act for the return thereof, by reason of any proceeding which he may have brought pursuant to this section;* nor shall any security interest asserted by the creditor in any such property or interest or proceeds be deemed to have been waived solely by reason of such proceeding." (Italics supplied.)

As Sec. 34(i) says, only the debt claimant is limited to the remedies of Sec. 34. The lien claimant, asserting an interest in the vested property, is secure in his right to proceed under Sec. 9(a), "pursuant to this Act for the return thereof." He may pursue his Sec. 9(a) remedy despite "any proceeding which he may have brought pursuant to this section", 34.

The plain words of the statute make the remedies under Sec. 9(a) and Sec. 34 alternative and cumulative. Congress intended precisely this. The Senate Report on the law which enacted Sec. 34 (Senate Rep. No. 1839, 79th Cong., 2d Sess.) says at page 9:

> "Protection of a secured creditor or a creditor claiming a lien is afforded by the proviso in subsection [34](i). Such a claimant may proceed as a general creditor, without thereby waiving his security. In addition or alternatively, he may file a claim or suit as a title claimant for return of his security interest in the property or for just compensation in respect of that interest, in which event his recovery would be reduced, as in the case of any other such plaintiff, to the extent of any debt-claim payment made to him (or to any other claimant, if his claim as a title claimant was not filed in time to hold up debt-claim payments). It is believed that this arrangement is preferable to provision of a separate special procedure for secured creditors."

The House Report is identical. H. Rep. No. 2398, 79th Cong., 2d Sess., p. 15.

On April 7, 1952 this Court accorded the Sec. 9(a) remedy to innocent stockholders to recover their amorphous interests in the property of a corporation having an enemy taint. The stockholder—if innocent—may sue under Sec. 9(a) though his interest is guilty and has been used to benefit the enemy. *Kaufman* v. *Societe Internationale, etc.*, 72 Sup. Ct. 611. Here both Orvis and its interest were innocent. The Orvis attachment was, in fact, an attack upon the enemy. *Zittman*, 341 U. S. 446, 463. Under *Kaufman*, the instant case is *a fortiori*.

B

The Sec. 9(a) remedy is not limited by, nor subordinated to, the Custodian's licensing power.

The Custodian's view is that Orvis could sue under Sec. 9(a) only if he had licensed the Orvis attachment.[17]

Nothing in Sec. 5(b), or in any other part of the Act, makes the Sec. 9(a) remedy a matter of the Custodian's grace. Anyone who is not an enemy may sue under Sec. 9(a). If he establishes his "interest, right or title" in the vested property, the "court shall order the payment * * * or delivery to said claimant of the money or property so held" by the Custodian "or the interest therein to which the court shall determine said claimant is entitled." Sec. 9(a). "The statute gives an absolute right to the suitor who comes within its terms * * *." *White* v. *Mechanics Securities Corp.*, 269 U. S. 283, 301.

If the policy considerations underlying the Custodian's power to license under Sec. 5(b) bear on the claimant's right to judgment, it is for the court to apply them in the Sec. 9(a) suit. "Nothing could be clearer than in a suit so brought the Court is to determine every issue necessary to the establishment of the claim." *Jackson* v. *Irving Trust Co.*, 311 U. S. 494, 501. It is for the Court, not the Cus-

[17] Footnote 16, supra p. 20.

todian, to decide whether the judgment will comport with the policy underlying Sec. 5(b).

The Custodian has never disclosed to court or litigant his criteria for granting or withholding a license. He has not done so here. In reality, he insists here that he may, by withholding such criteria from judicial scrutiny, defeat a Sec. 9(a) suit. The Constitutional right—for which Sec. 9(a) supplies the remedy—cannot be defeated by such arbitrary Executive action.

The Custodian is not bound to vest. *Clark* v. *Allen*, 331 U. S. 503, 511. If he chooses to do so, he vests subject to the conditions imposed by the Trading With the Enemy Act which creates the vesting power. One of those conditions is that he must submit to a suit for return under Sec. 9(a) by any non-enemy whose interest has been seized. The duty to submit is imposed by the Act. It is also imposed by the Constitution. If the Custodian were to use his licensing power under Sec. 5(b) to destroy the Sec. 9(a) remedy, the licensing power itself would fall before the Constitution. *Garvan* v. *$20,000 Bonds*, supra, p. 479; *Becker Steel Co.* v. *Cummings*, 296 U. S. 74, 79; *Josephberg* v. *Markham*, 152 F. 2d 644, 649.

In *Markham* v. *Cabell*, 326 U. S. 404, this Court made it clear that the Sec. 5(b) powers cannot be used to nullify the Sec. 9(a) remedy, saying at page 411:

> "* * * The right to sue, explicitly granted by § 9(a), should not be read out of the law unless it is clear that Congress by what it later did withdrew its earlier permission. We can find no indication in the 1941 legislation that Congress by amending § 5(b) desired to delete or wholly nullify § 9(a). On the contrary, the normal assumption is that where Congress amends only one section of the law, leaving another untouched, the two were designed to function as parts of an integrated whole. We should give each as full a play as possible * * *."

Later, the Custodian asked Congress to overturn *Markham* v. *Cabell*, to the extent of denying the Sec. 9(a) remedy to friendly foreign nationals. Congress refused stating that Sec. 34 "preserves in full these rights under 9(a) which the friendly foreign national, together with the United States citizen has had for more than 25 years under the act." (Senate Rep. No. 1839, 79th Cong., 2nd Sess., p. 2.)

In order to accept the Custodian's view, this Court must make the impossible finding that Congress, by Section 34, denied to Orvis, an American citizen, the very Sec. 9(a) remedy which, by the same enactment, it resolutely preserved to alien friends.

CONCLUSION

It is respectfully urged that the judgment of the Court of Appeals should be reversed.

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